

A PROGRAM FOR THE ELIMINATION OF THE HARDSHIPS OF LITIGATION DELAY†

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The inability of litigants to obtain swift justice is a searing reproach to the legal profession. If the public's confidence is to be restored and preserved, the profession must undertake a comprehensive program of reform. The ground work for reform is provided by the author's thorough analysis of the causes and effects of delay in the courts and a suggested program of specific reforms which merits careful consideration by the members of the bar.

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in the course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffeehouse in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless

Dickens, BLEAK HOUSE

The problem of litigation delay, as Dickens' quotation attests, has long been with us. Like the weather it is a common topic of conversation, at least among judges and lawyers. Unlike the weather someone occasionally does something about it; *Jarndyce and Jarndyce* would probably receive speedier treatment in the reformed English courts today. Nonetheless, delay in the litigation process still exists and, where it exists, frequently causes hardship. That litigants are still suffering hardship from inability to obtain swift justice is a searing

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reproach to the entire legal profession. But worse, the failure to find enduring solutions to the problems of delay jeopardizes the future of the judicial institution; public frustration may well lead to the initiation of alternatives wholly unacceptable to those who venerate the existing system.

It is the pressing obligation of the bar, therefore, to clean its own house. In doing so, however, it is not enough to resort to gimmickry alone. Modernizing calendar control, adding a few judges, tightening up the granting of continuances, and shifting judges around the state may well serve as a temporary palliative. But if hardship-causing delay is to be exorcised from the system on an enduring basis, a much bolder and more comprehensive program is required; one which will not only provide short-term solutions but which will bring to light and cure those defects in the system and in the legal profession which allow delay-caused hardship to be tolerated.

It is the purpose of this paper to suggest the outlines of such a program. Before turning to specific recommendations, however, it may be wise to explore briefly both the effects and causes of delay and to emphasize that not all delay is harmful. "Justice delayed is justice denied" has its opposite in "justice rushed is justice crushed."

I. THE EFFECTS OF DELAY

The beneficial effects of delay are seldom given the weight they deserve. The litigation process, however, does not always yield its best results under stress of rigid time requirements; experience with totalitarian regimes suggests that speed ought not to be equated with justice. Lawyers must be allowed a fair opportunity to prepare their clients' cases, to investigate facts, to utilize available discovery procedures, to develop legal issues and to plan their presentations carefully. In personal injury cases the passage of time may reveal the true nature and extent of the injuries more accurately than physicians can predict by examination shortly after the operative event. The chances for fair settlement out of court are enhanced when through maturation the claimant's damages become more certain and less speculative. In divorce cases delay prior to trial may provide a cooling-off period which, if properly utilized, can increase the chances of reconciliation.

Apart from providing opportunity for preparation, negotiation and settlement, which in themselves tend to cut down calendar congestion, the absence of time pressure may provide other advantages to litigants and to the judicial process. In jurisdictions where a relatively small number of well-known, competent attorneys receive a disproportionate share of the trial work, the liberal granting of con-

tinuances will provide a litigant who has his heart set upon the personal services of a particular attorney a better chance of retaining him to try the case. Where cases come to trial rapidly and where continuances are not freely allowed, a client may be forced to accept an attorney who is not his first choice. As for the judicial process itself, its machinery does not usually yield the best product when judges are forced to grind out their work under heavy time pressure. Judicial decision-making is an intellectual process which requires time for research and reflection. To sacrifice the quality of decision-making for quantity would most assuredly create widespread dissatisfaction with the entire process.¹

To be sure, there are some kinds of delay which do not yield the benefits just suggested, and, even where these benefits are present, it does not follow that the advantages to be derived from some mitigation of time pressure justify aggravated or unreasonable delay. Such delay can have as unfortunate an impact on the litigant and on the system as a draconian law.

The most visible example of hardship occurs in the personal injury case where plaintiff is not in a position financially to await the outcome of a long, drawn-out procedure.² Here delay may force a settlement on terms unfair to the claimant. The same is true in the area of workmen's compensation. Likewise, in the probate area, a delay in settling a decedent's estate may impose undue hardship upon the survivors. Such delay may not only cause hardship to claimants who cannot afford to wait it out, but it may also lead to support of clients by attorneys, in which case the attorney will have a greater financial interest in the outcome of the action than is proper.³

Of course, delay which adversely affects the economic or social standards of the claimant also has a long-term detrimental effect on

¹ This is particularly true with respect to criminal cases. See the series of articles in the *Washington Post*, Feb. 1-12, 1966, criticizing the operations of the General Sessions Court of Washington, D.C..

² This paper deals mainly with delay in civil actions, although some of the suggested programs would have a salutary effect on delay in criminal cases. That delay causes serious hardship in criminal cases, particularly where a defendant must remain in custody without bail pending trial, has been widely recognized. See "Punishment Before Trial," 48 *J. Am. Jud. Soc'y* 6 (1964). Hardship may also occur where certain crimes are not promptly brought to book, such as housing code violations. As the Building Commissioner of the City of New York was recently reported to complain, "When cases involving housing violations are adjourned, the crimes against the tenants continue." *N.Y. Times*, Jan. 14, 1966.

³ See Canon 43, *The Canons of Professional Ethics* of the ABA.

the legal system itself. Aggrieved individuals become impatient with the system and, if they can, resort to other alternatives including, on occasion, civil disobedience and violent self-help. On a less serious level, it is no secret that businessmen, refusing to brook the inconvenience, delay and expense of civil litigation, have increasingly turned to commercial arbitration as a substitute.⁴

Delay also adversely affects the quality of judicial fact-finding. Since the memory of witnesses tends to fade, the attempt in the trial process to arrive at some approximation of the truth or even to arrive at the preponderant probabilities becomes more unrealistic as time passes. It is perhaps a mockery of realism to suggest that the witnesses to a complicated automobile accident can reconstruct the operative events with any accuracy when called upon to do so several years after the occurrence.

In addition, in terms of the objectives of the American legal system, delay may tend to erode the controlling effect of judicially applied rules. In order to be effective the rules by which people guide their conduct ought to be applied to them reasonably soon after the operative events take place. If there is a great delay in the litigation process a lawyer may advise his client that even though his proposed conduct may violate a law, he will not be held accountable until some years after the unlawful conduct occurs. In such a case the client is less likely to be deterred than if the sanction presented an immediate threat. This problem becomes particularly acute when the economic gain to be achieved by violating the law until the delayed judgment is handed down and enforced exceeds the cost of the judgment.

From the foregoing, it would seem to follow that delay has both beneficial and harmful effects and that devices designed only to eliminate delay, without due regard for the consequences, may be unsatisfactory. Rather, the primary objective of the bar should be to eliminate the hardships and ill effects of delay rather than to eliminate delay *per se*. In some situations, however, certain ill effects of delay can only be prevented by eliminating the delay itself.

⁴ In the personal injury area, proposals have included arbitration, removal of litigation from the courts to administrative agencies applying scheduled payments similar to workmen's compensation, and sophisticated plans for "new allocations of the burden of motoring injuries." See, *e.g.*, Keeton and O'Connell, *Basic Protection for the Traffic Victim—A Blueprint for Reforming Automobile Insurance* (1965).

Donald B. Strauss, President of the American Arbitration Association, reported in a letter to the Editor of the *New York Times*, February 16, 1966, the growing use of and satisfaction with arbitration in settling claims of insured motorists arising out of accidents with uninsured persons.

II. CAUSES OF DELAY

A. *Institutional Factors*

1. Insufficient Manpower

One of the most obvious causes of trial delay is an insufficient number of trial judges. "In the simplest terms, delay is a problem of supply and demand. If there is delay it must be because the demand for judge time has outrun the supply."⁵ Increasing the number of judges will result in cleaner dockets only if judges do not treat the increase as an excuse for reducing the amount of time they spend in "judging."

There are some indications that there is an inadequate number of judges to handle the case loads in the large population centers of Ohio.⁶ And even some less sizable counties are having difficulties. For example, the Ohio Legislature has not added a judge to the civil branch of the judiciary in Lucas County since 1930.⁷ While all cases ready for trial can be tried in Lucas County in eleven to twelve months after filing, this generally favorable situation is not expected to continue without the addition of more new judges and the continued use of visiting judges.⁸ In general, however, insufficiency of the number of judges does not appear to be a serious cause of delay in the less populous counties;⁹ in these areas delay may be attributed to other factors.¹⁰

Providing more judges for urban counties may be a political problem exacerbated by rural control of the state legislature. The problem may be mitigated by reapportionment.

⁵ Zeisel, Kalvern & Buckholz, *Delay in Court* 3 (1959).

⁶ See Institute of Judicial Administration, *Calendar Status Study—1963, Personal Injury Cases* 5 (1963). The average delay from answer to trial in personal injury cases in common pleas court in 1963 was 35.7 months in Cuyahoga County (Cleveland), 23.2 months in Hamilton County (Cincinnati), 17 months in Franklin County (Columbus), and 21.4 months in Montgomery County (Dayton). In 1965 the average delay in Cuyahoga County was 42 months. *Id.* at 10.

⁷ This information was contained in a letter from the Hon. Geraldine F. Macelwane of the Lucas County Common Pleas Court to the author, Oct. 4, 1965.

⁸ Annual Report Showing the Progress of Lucas County Common Pleas Court for 1964 at 9.

⁹ See Institute of Judicial Administration, *Calendar Status Study—1963, Personal Injury Cases* ii, 5 (1963) and Institute of Judicial Administration, *Calendar Status Study—1965, Personal Injury Cases* vii, 10 (1965).

¹⁰ For example: "A single lazy judge, who disliked trial work, refused to set cases for trial and built up a backlog of 500-600 cases, 4-5 years old." 1964 Common Pleas Judges' Meeting 2.

2. The Darkened Courtroom

Even if in theory there are sufficient judicial resources to prevent serious backlog, inefficient utilization of time and poor organization can result in delay. This is largely a problem of calendar control. It can be argued that when cases are settled during trial, continuances are granted, or a trial is completed earlier than expected, the emptied courtroom and the judge's time should be immediately utilized for a new trial, pretrial, or motion hearings. While there is some logic to the argument, it should be recognized that the crucial question is what does the judge do with his time when he is not hearing a case. If the judge's time outside the courtroom is used for research and opinion-writing which results in well-reasoned decisions, then his work may be at least as productive in preventing hardship and dissatisfaction with the judicial system as it would be if he spent all of his daily working hours hearing trials. Is it preferable to have a judge utilize his time presiding over jury-tried cases or deciding matters as to which he is the primary decision-maker? It may well be that a constant flow of trials and hearings, day in and day out, will result in either poorly reasoned decisions or a backlog of unresolved cases. The problem of the "darkened courtroom" requires consideration of both alternatives.

3. Absence of Judicial Control

To the extent that the judicial system fails to provide time requirements and limitations upon the performance of certain procedural requirements, or to the extent to which breach of such requirements and limitations are not met with sanctions, the attorney is free to ignore and evade time requirements, or to establish his own. The absence of such controls may lead to delay in ordinary litigation. For example, an attorney may be allowed to place a personal injury case on a "non-triable" docket where it will remain until recovered by motion at the last possible moment. More serious, perhaps, are the situations where the parties in interest are not as involved in the litigation. In the settlement of estates and the filing of accounts in trust matters, for example, the proceedings are frequently not contested and the beneficiaries are not the initiators of the proceedings. Consequently, the attorney may be tempted to put off indefinitely the fulfillment of statutory requirements.¹¹

¹¹ See article in the *Columbus Dispatch*, Sept 5, 1965, p. 21a, col. 4, describing the efforts of the late Probate Judge Joseph J. Van Heyde to clear up 500 estates. "These delinquent cases," Judge Van Heyde reported, "involve millions of dollars,

4. Procedural Delay

A formalistic procedural system, administered with little or no regard for the ends of justice, which it is designed to serve, contains the seeds of delay and frustration. Rigid requirements of form in the pleadings, for example, give rise to dilatory motions, such as the motions to strike and make definite and certain, which may be interposed mainly for the purpose of delay. Conversely, vague and loose procedural requirements may produce a like effect. The right to plead in vague terms may cause a lengthy postponement of the time when the triable issues are recognized and a consequent postponement of effective settlement negotiations.

Even procedures designed to expedite the just determination of a case can have a contrary effect. The right to an interlocutory appeal of a preliminary question, for example, may prevent hardship and delay in instances where the final resolution of the issue may obviate the necessity of a plenary trial. But this right can also cause delay where a party is allowed to appeal from a multitude of procedural decisions made throughout the course of a law suit. Similarly, the pretrial conference and pretrial discovery, designed to prevent surprise, to encourage settlement, and to speed up the trial of a case, contain the seeds of delay. A meaningless pretrial conference, carried on only to fulfill a requirement of statute or rule and without the presence of attorneys authorized to make binding agreements or enter into stipulations, has no effect other than to delay the trial date and waste the judge's time.¹² Similarly, the discovery process contains within itself great potential for delay and harassment. One example is the use of motions and appeals to raise numerous questions during the taking of depositions.

Perhaps there are some procedural devices which can only have the effect of speeding up the administration of justice. In the main, however, most procedural rules are capable either of speeding up the resolution of a case or *slowing it down*. What is crucial is the way in which the rules are administered and interpreted. Overly tight or overly loose administration of procedural rules, *without reference to the purpose which they are intended to serve*, can cause harassment, delay, and hardship.

create unnecessary expense, prejudice to property rights and loss of earning power to widows and other beneficiaries."

¹² Clark, "Objective of Pre-Trial Procedure," 16 Ohio St. L.J. 160 (1956); "Symposium—Pre-Trial," 7 W. Res. L. Rev. 367 (1953).

5. Continuance Practice

The use of continuances is a particular area of procedure which merits special treatment. Whether liberality in granting continuances is a cause of *undesirable* delay depends upon a number of variables, such as the availability of cases ready to fill the gap left by the continuance, the purposes for which continuances are granted, and the general state of the calendar. However, in jurisdictions where the dockets are lagging, where only a few firms are responsible for a high percentage of litigation, and where a continued case creates a darkened courtroom, it is probable that the granting of continuances contributes to delay.¹³ Furthermore, from the point of view of the individual client, the ease of obtaining continuances may cause the hearing of *his* case to be postponed beyond the time which the normal calendar lag would require.

It should be remembered, however, that reform of the continuance practice may affect other interests, such as a litigant's desire to select a particular attorney to try his case and the desire of some firms to maintain control of a large percentage of the cases tried in a particular jurisdiction.

6. Availability of Witnesses

In trials which require expert testimony, delay may occur when the experts are not available. In such cases the attorney has a legitimate ground for an adjournment or continuance, but the result, nonetheless, may be to exacerbate delay.

B. *Professional Factors*

Except when caused by an insufficient number of judges and insurmountable defects in procedure, delay and attendant hardship are the results of situations brought about by the prime actors in the judicial process, the lawyers and judges themselves. The existing judicial system, consisting of rules and statutes as well as physical facilities, is for the most part an empty vessel which is only filled with life by human beings who have wide discretion in the way that they act. There is much to be said, therefore, for the proposition that if bench and bar were really interested in mitigating the hardships and inconveniences caused by delay, they have it within their power to do so. There are shining examples of judges who, almost singlehandedly, have quickly eliminated a log jam of cases or at least have made sub-

¹³ Cf. More Judges Proposed for Cleveland Congestion, 42 J. Am. Jud. Soc'y 29 (1958).

stantial reductions in unconscionable delays.¹⁴ The relevant question, therefore, should perhaps be framed in this fashion: What factors cause lawyers and judges to create and tolerate non-beneficial delay?

A partial answer to this question might be found by analyzing all those complex psychological factors, such as personality, intelligence, interests and motivation, which together determine whether any professional is going to help solve or aggravate the problems which exist in his profession. In the case of a judge it may be phrased in terms of a question of "judicial temperament." In the case of a lawyer it is popular to refer to "professional responsibility." These terms obviously involve too many diverse and complicated elements to be discussed in detail here.¹⁵ The usual frailties and strengths of character and ability found in all men, however, may be manifested in lawyers and judges by specific traits which affect the problem of delay. For example, an attorney's insecurity may cause him to hoard unfinished cases which represent unrealized values; excessive egoism may result in a coldly "professional" detachment from the felt needs of the litigants; and neurotic self-doubt may create paralyzing fear of the process of trial. These characteristics, in turn, will tend to affect the tactics of the practitioner in dealing with his opponents. Thus, the use of delay to force an unfavorable settlement upon an impecunious plaintiff may also serve to cushion the lawyer against his own insecurity, egoism and self-doubts.¹⁶

There are, of course, non-personal factors which may be relevant to this injury. In the cases of judges, a strong chief judge or a superior tribunal with power to exercise superintending control may encourage, if not require, judges to take an active part in solving the problems of delay. Where elected judges are on the individual assignment system, political pressures may require them to keep their dockets at least reasonably current. The availability of law clerks to assist judges in the performance of their decisional functions may release them from the more tedious aspects of legal research and thus provide them with time to take a more active interest in judicial administration. Conversely, the absence of these factors may permit or even compel a judge to ignore the problem of delay.

As for lawyers, a heavy workload of cases and trials, coupled

¹⁴ See, e.g., Kaufman, "Decongestion Through Calendar Controls," *Annals* 85 (March 1960).

¹⁵ See generally Redmount, "Attorney Personalities and Some Psychological Aspects of Legal Consultation," 109 U. Pa. L. Rev. 972 (1961).

¹⁶ See Kunin, "Court Congestion: Some Unorthodox Hypotheses," 39 Conn. B.J. 546, 547-48 (1965).

perhaps with an unwillingness to share work with others, is obviously a factor in the creation of delay. As pointed out earlier, an excess of work may require a lawyer to seek adjournments and continuances of some cases in order to meet his obligations to others. Similarly, he may have to ignore or postpone consideration of the problems of some of his clients for an unreasonable period of time while working with the files of others. Such a lawyer is not merely ignoring the problem of delay; he is creating it as well. Other factors may also be relevant. For example, attorneys whose compensation is measured on a per diem basis may have a pecuniary interest in resisting settlement and in prolonging trial.¹⁷ The temptation may be irresistible to a lawyer whose practice does not yield a reasonably good return and who has substantial living expenses. And, finally, inefficient and slipshod office management may also contribute to the overall problem.

C. *The Client*

There are many situations in which the client himself is a cause of delay. If he dallies in bringing his problem to a lawyer in the first place, he may create time-consuming problems of proof-gathering. If he fails to respond to requests from his own attorney to gather specified items of evidence, to provide information, to attend conferences, or to sign documents, he may cause delay which may in turn be a cause of hardship to co-parties and to his opponents.

Occasionally, clients may make unreasonable demands upon their lawyers and the judicial system. They may ignore good advice as to the reasonableness of a settlement and insist, perhaps vindictively, upon their right to a trial.

However, actual delay caused by a client may not be nearly so serious, from the point of view of the integrity of the judicial system and the esteem of the legal profession, as imagined delay. A real delay may not necessarily cause hardship. And even if actual hardship is caused, it need not reflect adversely upon the judicial system or the legal profession. Some delay and some hardship is bound to occur in any judicial system. What is meant by imagined delay, therefore, is really the response of a client who becomes angered and frustrated by a delay which is not excessive or, even if excessive, is unavoidable. Studies have shown that a client, to be satisfied, may need more than a successful outcome from his lawyer. He may require reassurances, commiseration, and a sense that his attorney and the judicial system are really interested in his cause.¹⁸ A trial delay

¹⁷ Similarly, a lawyer whose contingent fee increases after trial is begun may be encouraged to postpone settlement in order to receive a higher fee.

of ten months or one year for a personal injury action is certainly not excessive and may, indeed, be considered ideal. But if the client is left totally in the dark by his lawyer after the initial conference and throughout the delay period, and if the nature of the proceedings and the reasons for the delay are not explained, he may actually believe that he and his cause have been deserted.

The cumulative effect of such imagined delay is extremely harmful to the public's confidence in the legal system and to the reputation of the bar. It may, indeed, account for more bitterness than the relatively small amount of genuine hardship caused by actual delay.

III. RECOMMENDED PROGRAMS

The purpose of this section is to set forth a series of programs which, taken together, would go a long way toward curing the disease of delay-caused hardship if effectively implemented. It is not the writer's intention to suggest any necessary priorities among the suggested programs or even to endorse each of the reforms they suggest. What is recommended, however, is a massive, bar-supported attack upon delay-caused hardship which would entail careful study of the programs outlined here, followed by prompt and effective implementation of those which prove feasible.

A. *Institutional Reform*

1. Advancement of Cases for Trial

It is recommended that a study be made of court rules and statutes providing for advancement of cases for immediate trials to determine the extent to which cases in which delay causes actual hardship are entitled to *and receive* priority on trial dockets.¹⁹ The study should extend to administrative agencies, like the Industrial Commission,²⁰ as well as to the courts. Where necessary, new procedures should be developed to insure that cases involving real hardship and matters vital to the public interest, and only those matters, receive special treatment. These might include the requirement that the party seeking the advancement execute an "affidavit of special urgency" containing specified factual information or even the requirement that he testify in court as to the reasons for hardship. Penalties for false swearing more easily applied than conviction for perjury,

¹⁸ See Redmount, "Psychological Discontinuities in the Litigation Process," 1959 Duke L.J. 571 (1959).

¹⁹ Cf. Ohio Rev. Code Ann. §§ 2311.07-.08, and § 2501.09 (Page 1954).

²⁰ Cf. Ohio Rev. Code Ann. ch. 4123 (Page 1954).

such as imposition of costs and attorneys' fees, might be adopted. Proposed statutes might spell out, in some detail, priorities to be assigned to special classes of cases, or, if more flexibility were desired, the assignment of priorities might be administered pursuant to binding court rules promulgated by a judicial body. A carefully planned and studiously supervised advancement program, as described above, should provide an effective short-term solution to the problem of hardship caused by actual delay.

2. State-Wide Court Reorganization

It is recommended that strategies be formulated to effectuate a program, heretofore unsuccessful, to reorganize the Ohio judicial system.²¹ The establishment of a simplified court structure and the creation of clear lines of judicial responsibility should result in more efficient operations. Current proposals call for the partial unification of the courts, the placing of broad rule-making powers in the Supreme Court of Ohio, and the adoption of a modernized plan for the selection and retention of judges, all of which are to be accomplished initially through constitutional amendment.²² Reforms of this scope frequently run head-on into vested interests or, worse, into the inertial biases of influential persons perfectly satisfied to retain a system which is at least familiar to them, even if it has few other redeeming features.²³ Strategy planning here should obviously attempt to secure the broadest possible support from influential members of the legal community and the public-at-large and should include, as well, a program of public education.²⁴

3. Extended Court Sessions

The possibility of scheduling trials in the evening, as an expedient to clean up a jammed docket, ought to be examined. There would appear to be a number of advantages to this practice, perhaps the most important being the greater availability of parties and witnesses. In addition, jurors could be selected from a wider and more representative cross-section of the population if the excuse of work hardship were not available.

²¹ See Morris, "What Court Reform Can Do for You," 21 Columbus Bar Briefs, No. 11, p. 4 (Feb. 4, 1966).

²² The proposals are spelled out in 37 Ohio St. B.A. Report 371, 1249 (1964) and discussed therein at 916, 955, 987, 1008 and 1036.

²³ See generally Nims, "The Law's Delay: The Bar's Most Urgent Problem," 44 A.B.A.J. 27 (1958).

²⁴ *Ibid.*

Similarly, the utilization of summer months for jury trials ought to be explored.²⁵

4. Impartial Witnesses

Several jurisdictions have resorted to a panel of "impartial" medical witnesses as a device to reduce the time consumed by expert medical testimony. Such a device also discourages purely frivolous actions, encourages settlement, and assists the trier of facts where the experts provided by the parties are in irreconcilable conflict. The feasibility of the use of such panels, especially in counties where delay is a serious problem, ought to be explored. However, a caveat is in order: The use of "impartial" medical witnesses may be inconsistent with the tenets of the adversary system. Its use, therefore, ought not lightly to be undertaken.²⁶ If undertaken, it ought to be accompanied by substantial safeguards to insure that the panel does not become a partisan proponent of one point of view.

5. Pre-Judicial Tribunals

Much has been written about the use of informal arbitration panels and non-judicial hearing officers as a means of clearing up a backlog of personal injury cases.²⁷ The success of such innovations as the Pennsylvania arbitration tribunal and the Massachusetts "auditor" system,²⁸ however, has not been clearly established. Serious doubts have been raised as to their efficacy,²⁹ especially in cases where the financial stakes are high. Nonetheless, carefully developed variations upon these alternatives might prove useful to clear up a serious congestion problem.³⁰ They merit careful consideration.

6. Continuance Practice

New Jersey, under the forceful guidance of late Chief Justice Vanderbilt,³¹ provided an excellent example of the effectiveness of

²⁵ See Tauro, "Congestion in the Courts," 49 Mass. L.Q. 171, 172-73 (1964).

²⁶ See Report of 1963 Comm. on Expert Testimony of Judicial Admin. Sec., ABA; Diamond, "The Fallacy of the Impartial Expert," 3 Archives of Crim. Psychodynamics 221 (1959); Report of the Special Committee, Ass'n of the Bar of the City of New York, Impartial Medical Testimony (1956).

²⁷ See, e.g., Dworkin, "Let's Arbitrate," 25 Cleveland B.A.J. 107 (1954).

²⁸ See Penna. Stats., tit. 5 § 30 (Purdon 1963); *id.* tit. 12, Rules of Civ. Proc. 1044(d) (Purdon Supp. 1965); Rosenberg & Chanin, "Auditors in Massachusetts as Antidotes for Delayed Civil Courts," 110 U. Pa. L. Rev. 27 (1961).

²⁹ See, e.g., Tauro *supra* note 25, at 173, where Chief Judge Tauro, of the Massachusetts Superior Court, reports with pleasure that references of tort cases to auditors is declining and sets forth some of the objections to the use of auditors.

³⁰ See Strauss letter, *supra* note 4.

³¹ As to Justice Vanderbilt's contribution to judicial reform in New Jersey, see

close control over the granting of continuances as a means of eliminating calendar congestion.³² The success in New Jersey suggests that some tightening of continuance practice,³³ perhaps by removing it from the discretion of the attorneys who may agree as a matter of course to continuances in order to receive reciprocal treatment, ought to be considered. The possibilities are not limited to judicial control by enforcement of inflexible court rules; salutary results might be achieved as well by requiring the parties themselves to agree in writing to continuances requested by their own attorneys.

7. Procedural Reform

As suggested earlier,³⁴ procedural rules have their impact upon court delay,³⁵ especially if they are enforced too strictly or too loosely without regard to the ends of justice they are designed to serve. If rules emanate, in a disorganized way, from a variety of different courts as well as the legislature, they are more likely to be misunderstood and misconstrued. Perhaps in the future, the reorganization of the judiciary into a unified court system with overall rule making power in the Ohio Supreme Court will provide the necessary precondition for procedural reform. In the meantime, the following recommendations ought to be considered:

(a) Pleading rules ought to be reexamined and, if necessary, liberalized to avoid purely technical objections to form.

(b) Rules relating to jurisdiction of the person and subject matter, venue, forum non conveniens, joinder of parties and joinder of actions ought to be examined carefully to determine the extent to which their lack of clarity creates delay.³⁶ Perhaps poor statutory draftsmanship and vague constitutional standards require courts to spend an unreasonable amount of time on preliminary motions to dismiss or transfer, or on appeals from the determination of such motions. It must be recognized that in these areas considerations of

generally, "Vanderbilt: Administrator of Justice," 31 State Government 224 (1958) in Elliott, *Improving our Courts* (1959).

³² See Brennan, "New Jersey Tackles Court Congestion," 40 J. Am. Jud. Soc'y 45, 48 (1956).

³³ Cf. Comment, "The Matter of Continuances," 18 Ohio St. L.J. 106 (1957). See also Rule 15(f) of the Franklin County Common Pleas Court and 42 J. Am. Jud. Soc'y 29 (1958).

³⁴ See text accompanying note 12 *supra*.

³⁵ See Peck, "The Complement of Court and Counsel," The Thirteenth Annual Benjamin N. Cardozo Lecture, delivered before the Ass'n of the Bar of the City of New York on April 22, 1954.

³⁶ Cf. Ohio Rev. Code Ann. ch. 2309 (Page 1954).

fairness and convenience frequently compete with certainty and simplicity; the United States Supreme Court's treatment of personal jurisdiction is a prime example. Nonetheless, even within the framework of vague constitutional standards it may be possible to phrase statutory requirements to provide for more certainty. Where this is not possible, lawyers should urge the supreme court to adopt standards which will accommodate the competing policies.

(c) Pretrial conference *practice* ought to be carefully examined.³⁷ Pretrials can be very helpful in achieving settlement and shortening trial time, but they can also be wasteful and oppressive if not properly administered. Court rules should spell out in some detail the requirements of the pretrial conferences,³⁸ making mandatory the attendance of attorneys with authority to enter into stipulations, but also making clear that the judge's role is non-coercive.

(d) Rules and statutes controlling appellate practice, and the practice itself, should be examined to determine whether opportunities for dilatory tactics are available, particularly in appeals from non-final judgments or orders.³⁹

(e) Penalties for frivolous motions and dilatory tactics, perhaps by imposition of attorney's fees and costs, should be spelled out in court rules and, where necessary, by statute. Such rules should be invoked either by the parties on motion or by the judge, *sua sponte*, where the attorneys are unwilling, perhaps by reason of reciprocity, to invoke them.

(f) Rules and statutes relating to pretrial discovery ought to be reexamined with a view to reform designed to take maximum advantage of the benefits which can be derived from full disclosure of facts prior to trial.⁴⁰ Such disclosure, of course, will tend to make the

³⁷ That is, the practice itself rather than merely the appropriate court rules. Experience indicates that local practices within the same state may vary widely even under the same court rule. See note 13 *supra*.

³⁸ See, e.g., Franklin County Common Pleas Court, Rule XXVII as amended February 1, 1965 and Fed. R. Civ. P. 16.

³⁹ Generally appeals in Ohio must be from "final" judgments or orders. 2 Ohio Jur. 2d *Appellate Review* § 26 (1953). Nonetheless a variety of techniques may be available to bring questions to an appellate court during a pending litigation and before judgment dispositive of all the issues is rendered. In some jurisdictions, for example, a litigant may delay the proceedings in the trial court by seeking "leave to appeal" from orders with which he is aggrieved, or he may avoid the finality requirement by seeking an appeal formally designated as an original writ of mandamus or prohibition against the trial judge. It is practices such as these and their effects which the recommended study should attempt to uncover.

⁴⁰ See Ohio Rev. Code Ann. chs. 2317, 2319 (Page 1954) and Ohio Legal Center Institute, *Personal Injury Litigation in Ohio*, ch. 20 (1965).

pretrial conference more effective, shorten trial time and, most importantly, lead to more realistic settlement positions.⁴¹ On the other hand, discovery can be a device for harassment and delay if not properly controlled. The federal discovery rules, Fed. R. Civ. P. 26-37, stand as the model of good discovery practice, combining liberality with protection against harassment. Perhaps they should serve as the standard when the local rules are reexamined and reorganized.

8. Split Trials

A recent innovation in procedure which has been received enthusiastically by those interested in eliminating calendar congestion is the use of the split trial in personal injury actions.⁴² Under this device the question of liability, if separable from the question of damages, is tried first. A second trial on the questions of damages is then held, preferably with the same jury, if, but only if, the defendant is found liable in the first trial. Since the difficulty of securing the attendance of medical witnesses is likely to require the granting of continuances, and since medical testimony is frequently the most time-consuming element of a personal injury action, the splitting of trials into two parts has the advantage of avoiding extensive medical testimony where the liability trial results in a decision for defendant. It must be conceded, however, that the use of the split trial is controversial and may be disfavored by some, although the opposition seems to disappear as experience develops. In general, it is open to the following objections:

(a) It may violate the constitutional rights to jury trial. Although the United States Supreme Court has not passed on the question whether its use in a diversity case violates the Constitution, it would not appear to be a serious problem at least in cases where the same jury is used for both phases of trial.⁴³

(b) It is not always possible to separate the issue of liability from the issue of damages.

(c) The split trial may favor defendants by allowing the defendant's attorney to keep plaintiff's serious injuries out of the jury's view during the trial of liability and thus avoid the emotional impact

⁴¹ Tauro, "Improving the Quality of Justice in Massachusetts," 49 Mass. L.Q. 7, 14-35 (1964).

⁴² Meirer, "Court Congestion: A New Approach," 45 A.B.A.J. 1265, 1268 (1959); "Will Split Trials Solve Court Delay? Negative Response," 52 Ill. B.J. 1004 (1964); Note, 46 Minn. L. Rev. 1059 (1962); see also Note, 17 Okla. L. Rev. 114 (1964).

⁴³ See *Hosie v. Chicago & N.Y. Ry.*, 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

and sympathetic reaction which may attend the knowledge of such injuries.⁴⁴

Nonetheless, the split trial ought to be carefully considered. As Professor Zeisel has stated in his conclusion from a statistical study of this device: "From our investigation we have learned that separation is a powerful remedy for court congestion. Fully used, it would be equivalent to increasing the number of judges trying cases by one-fifth."⁴⁵

9. Elimination or Modification of Jury Trial in Certain Classes of Cases

If England can be cited as an example, the elimination or modification of the right to full jury trial in civil actions in a common law system does not seriously undermine the sanctity of the adversary system nor does it create serious popular dissatisfaction with the judicial process.⁴⁶ Since there exists a causal relationship between exercise of the right to jury trial in civil actions and court congestion, it would seem to follow that modification of the former might have a salutary effect upon the latter. However, the right to jury trial, for reasons that are obvious to most lawyers, is not easily dislodged. Its outright abolition, or its replacement, in the case of personal injury actions, with a workmen's compensation-like board or similar substitute, may be impractical at the present time. Nonetheless, middle grounds ought to be explored. The use of an auditor or arbitration panel, whose decision may be treated as *prima facie* evidence in a subsequent trial, if

⁴⁴ Apparently claimant's counsel, originally distressed with the split trial, have become more favorably disposed to it, since they may gain an advantage by avoiding a compromise verdict once liability is established. See address by Hon. Bernard M. Decker, Judge of the Circuit Court of Illinois before the National Conference of State Trial Judges in San Francisco, 1962 entitled: "Personal Injury Actions—Separate Trials on the Issues of Liability and Damages."

⁴⁵ Zeisel and Callahan, "Split Trials and Time Saving: A Statistical Analysis," 76 Harv. L. Rev. 1606, 1624 (1963).

⁴⁶ Diamond, "English Interlocutory and Pretrial Practice and Procedure," 47 A.B.A.J. 696, 100 (1961):

[I]n the last century, the extent of trial by jury in civil actions has steadily diminished, and now the number of such actions is only about 3 per cent of the actions in the Queen's Bench Division. There is a legal right to a jury in actions for libel and slander, false imprisonment, malicious prosecution, seduction and breach of promise of marriage and a party charged with fraud may also demand a jury. In all other cases, it is a matter of the court's discretion whether a jury is awarded or not, but the profession and the public prefer the greater certainty of trial by judge alone, and a jury is not commonly asked for.

one is demanded, has already been suggested.⁴⁷ Other measures might include (a) increasing the fee for a jury trial; (b) imposition of full costs of jury trial upon the party requesting it, with only partial return from the other party in the event of a successful outcome; (c) abolition of jury trials in certain limited classes of cases where the need for a community judgment is slight, for example, commercial actions, cases involving less than a stipulated sum, etc.; or, (d) any combination of the foregoing.

Other innovations which might tend to cut down the number of requests for jury trials also deserve some consideration.⁴⁸ These differ from the foregoing in that they would achieve the result by imposing some limitations upon the amount of recovery, especially for pain and suffering. Perhaps the initial opposition to proposals limiting the amount of recovery might be overcome by allowing recovery in a wider variety of situations, for example, by adopting rules of comparative negligence.

10. Calendar Reform

It is recommended that the method of bringing cases to trial be reexamined for the purposes of instituting reforms designed to provide a steady, but not oppressive, flow of cases ready for trial. Among the elements to be studied are the methods by which cases are called for trial, the assignment system, and the disposition of cases not ready for trial. Since it has been found that a large proportion of the cases which cause a backlog are those which will eventually be settled,⁴⁹ research should be directed to the formulation of procedures which will encourage trial judges to maintain contact, personally or through their clerks, with attorneys handling such cases. Startling results in jurisdictions with extraordinary problems of congestion have been achieved by judges who have taken a personal interest in delayed cases.⁵⁰

11. Interest on Judgments

Statutes, court rules and decisions relating to interest upon judgments should be examined and analyzed to determine whether and to what extent financial advantages may accrue to defendants, particularly insurers, who delay settlement; whether such advantages, if they exist, are realized at the expense of claimants and, if so,

⁴⁷ See text accompanying note 28 *supra*.

⁴⁸ See Keeton and O'Connell, *op. cit. supra* note 4.

⁴⁹ Geller, "Unreasonable Refusal to Settle and Calendar Congestions—Suggested Remedy," 34 N.Y.S.B.J. 477 (1962).

⁵⁰ See Kaufman, note 14 *supra*.

whether amendment of interest rules, by increasing the interest rate and/or by starting interest at an earlier date, might not take some of the advantage out of delay.⁵¹

B. *The Bar*

1. Communication with Clients

In order to solve the psychological problem of imagined delay, attorneys must be encouraged or even required to keep clients informed of the status of their causes and, more importantly, of settlement offers, by regular and frequent communications. If clients have questions about their cases, whether foolish or not, they should have reasonable access to their attorneys, and their attorneys should attempt to provide candid and truthful answers. So important is the need for communications between lawyer and client that it may be worthwhile to consider the adoption of a new canon of ethics explicitly requiring such communications.

2. Education of Litigants

In connection with the prior recommendation, it is suggested that litigants be apprised of the outline of the procedure which their attorney is following and an explanation, in terms comprehensible to laymen, of the reasons why their cause may not be promptly resolved. To this end it is recommended that the bar prepare a series of handbooks for parties to civil actions, to criminal actions, to administrative proceedings (especially workmen's compensation), to probate proceedings, to appellate proceedings and perhaps even to real estate transactions, which would be distributed free of charge to the parties at their first interview with the lawyer, or perhaps even before in the case of criminal proceedings.⁵²

3. Law Office Management

It is believed that lawyers, as a group, are notoriously inefficient in the management of their offices. Yet, a poorly ordered law office may contribute substantially to delay causing calendar congestion and hardship to clients. Programs, including conferences, and brochures designed to introduce lawyers to up-to-date, efficient methods of law

⁵¹ See letter of Samuel B. Waterman to the Editor of the New York Times, Feb. 22, 1966, p. 22, col. 7, "Some [insurance] companies . . . prefer the congestion because they utilize the reserves set aside to further their financial aims." See also Kunin, "Court Congestion: Some Unorthodox Hypotheses," 30 Conn. B.J. 546, 549 (1965).

⁵² Cf. the "Juror's Handbook" prepared for the Commonwealth of Massachusetts under the direction of Chief Justice G. Joseph Tauro of the Massachusetts Superior Court.

office management, especially recent developments in the use of office equipment, might prove useful here.

4. Policing of Mandatory Time Requirements

There are many techniques available to insure that attorneys comply with time requirements established by court rule or statute. Techniques should be adopted which would impose a sanction upon the attorney, but which would not penalize the client for the attorney's failure. Thus, for example, the entering of a default judgment or a non-suit as a penalty for non-appearance at pretrial or for failure to file a pleading tends to penalize the innocent client more than his lawyer; an action against the attorney for malpractice is not a particularly effective sanction. Other techniques, therefore, would seem to be more appropriate and worthy of study:

(a) Direct Communication Between Tribunal and Client. Where lawyers are prone to procrastinate in the filing of required documents, such as the accounts of executors and trustees, it may prove effective for the judge to send a warning card directly to the client or, in the case of an estate, to the beneficiaries. Such a practice might encourage the attorney to avoid the embarrassment of explaining his tardiness. Perhaps a standardized procedure requiring such direct communication in all cases where knowledge of delay is important to the parties should be adopted by court rule or statute.⁵³

(b) Attorney Fines and Penalties. While controversial, fines and penalties imposed directly against attorneys who fail to comply with specific rules might reduce delay more effectively than mere exposure of tardiness to the client.⁵⁴ If diligently enforced by judges, this device might be effective not only to penalize failure to meet time requirements but also to penalize other acts or omissions which tend to cause delay. For example, the attendance at a pretrial conference by a junior clerk without authority to enter into stipulations or negotiate settlement might well justify imposition of a penalty against the clerk's firm. Perhaps the penalty could be measured by the value of the lost time of the opposing attorney who attended the conference for naught, and paid to that attorney. Penalties could also be imposed

⁵³ Mr. Justice Black, dissenting in *Link v. Wabash R.R.*, 370 U.S. 626 (1962), argued in favor of "the rule that no client is ever to be penalized . . . because of the conduct of his lawyer unless notice is given to the client himself that such a threat hangs over his head." *Id.* at 648.

⁵⁴ See generally Comment, "An Attorney Fine: A Sanction to Ensure Compliance With Court Calendar Orders," 30 U. Chi. L. Rev. 382 (1963). See also order of Probate Judge Joseph J. Van Heyde, 20 Columbus Bar Brief No. 17, p. 9 (May 8, 1965).

for filing frivolous pleadings or motions. The imposition of a monetary fine might be easier to administer, and far less cumbersome, than official disciplinary proceedings or exercise of traditional contempt powers. However, one of the difficulties which must be met in framing an appropriate statute or court rule would be the likelihood that the attorney assessed with such a fine might try to charge it back to his client.

5. Access of Litigants to a Grievance Committee

A grievance committee composed of distinguished lawyers to hear citizen complaints against lawyers is an appropriate intra-professional device that has already been shown to work well.⁵⁵ Perhaps conciliation committees should also be organized on a local level to hear complaints before they develop into full-blown "grievances." Wide publicity could be given to the existence of such committees. Members should be encouraged to adopt and apply the highest standards of the profession in framing their recommendations for further action, lest their proceedings be characterized as a "whitewash."

6. Improving Professional Responsibility

While specific rules and practices imposed by judicial or legislative fiat may be effective in the short run to police the problem of delay and to eliminate the hardships it causes, the bar, as a profession, has an interest in maintaining order in its own house without external compulsion. Among the steps which might be taken to elevate the professional responsibility of the bar and to insure that individual members concern *themselves* with the problem of delay are:

(a) Pre- and Post-Graduate Education for Professional Responsibility. Hardship caused by delay is unfair and unjust. Thus this statement by Professor Harry Jones of the Columbia Law School has some relevance: "A lawyer, a real lawyer, should react to unfairness, inequality or abusive procedure as a bishop reacts to heresy or a painter to a meretricious composition."⁵⁶ Far too many practicing lawyers, however, conceive of the practice of law as just another business, another way to earn a living. From this it follows that ordinary business ethics become the norm of practice. It seems clear that the law schools and the bar have not done nearly enough to bring home to lawyers the obligations they owe to their clients and the public to insure that the judicial system functions fairly and without undue delay, an obligation that overrides their personal quest for

⁵⁵ See 38 Ohio Bar No. 50 p. 1366 (Dec. 27, 1965).

⁵⁶ Proceedings, Ass'n of American Law Schools, Part Two 77 (1963).

economic gain. It is suggested, therefore, that both the organized bar and the law schools develop interesting programs to develop professional responsibility in lawyers. In this connection it may be suggested that bringing home to lawyers some of the harsh alternatives that face them if they abjure their responsibility, a few of which are outlined in this paper, may be an appropriate technique. Preferably, however, programs which help to create an understanding of the joys of professionalism for its own sake, perhaps through study of the lives of the great lawyers and judges of the past, will tend to inculcate a more lasting sense of professional responsibility.

(b) Effective Organization of the Bar. A well-organized, effective bar association can accomplish much by way of reform, especially if its committees can draw on talent from a wide geographical area. Decentralization may not be the most effective form of organization. A comparative study of bar associations might turn up some useful recommendations for reorganization of the bar.

(c) Admission to the Bar. In the last analysis, the response of the bar to problems of delay will depend upon the attitudes, efficiency and ability of the members of which it is composed. The disinterested lawyer, the inefficient lawyer and the poorly trained lawyer undoubtedly contribute heavily, either as practitioners or judges, to the causes of delay and the hardship it brings to litigants. Perhaps, therefore, it is incumbent upon the law schools and the bar examiners to work together to raise the standards of those who enter the profession. It is far from clear that these institutions are doing all that can be done within the framework of the current on-rush of students to see that standards are improved.

Among the areas which could use some study are admission standards, including grade averages, test scores and course content, standards for retention in law school, and particularly, bar examinations. With respect to the last item, inquiries might fruitfully be made to determine the extent to which subjects covered by the bar examination reflect an incorrect or obsolete view of the areas of knowledge vital to the lawyer who functions in today's complex society and the extent to which such subjects influence course availability and election by law students. It might well be discovered that the tail is here wagging the dog. Further examination of bar examination requirements might attempt to detect whether mechanical rule memorization and arid logic chopping is encouraged, or whether questions asked call, in addition, for understanding of various legal processes and theories. Bar examinations which encourage the student to adopt a mechanistic or purely technical view of the law may, in states where

such is the case, be more than a slight cause of the non-professional outlook of many of its lawyers.

Such studies might result in recommendations for greater co-operation between law schools and bar examiners, for minimum standards of acceptance and retention in law schools, and, possibly, for innovations in the process of examination as it is now conceived. They might even lead to further studies of law student motivation, including the question whether competition for grades and high scores on examinations, and the use of such criteria in granting awards and making job offers, do not tend to distort the values of the student.

C. *The Bench*

Eugene V. Rostow, former Dean of the Yale Law School, has written:

The test of court reform is not clearing calendar congestion nor shortening the time span between the filing of complaints and the payment of judgments. These dramatic features of the tables of judicial statistics, about which so many hands are wrung so hard, are not trivial matters, and many vascular systems have been strained by devoted efforts to deal with them. But what really counts is the judges. Have all the pushing and pulling; all the speeches and letters and articles; all the footnotes and buttonholings in corridors; all the weary days and nights in committee rooms and on the telephone, actually resulted in raising the level of judging? If, but only if we can honestly answer this question in the affirmative, will the victory be worth the struggle required to win it.⁵⁷

Conversely, it might be added, elimination of delay and congestion by lowering the level of judging would be far too great a price to pay. There are, however, some steps which, if prudently taken, ought to avoid that unfortunate result.⁵⁸

1. Increase the Number of Judges in Counties Where Calendar Congestion Is a Problem

This, of course, is more easily said than done, political realities being what they are. Nonetheless, it is the most direct way of providing additional "judging hours." Perhaps well-organized, non-partisan public education, as suggested in the next section of this paper, would eventually create the necessary public support to achieve

⁵⁷ Rostow, Book Review, 37 Conn. Bar J. 482 (1963).

⁵⁸ Needless to say, one way to improve the level of judging is to appoint better judges. Attempts are already underway in Ohio to improve the judicial selection process. See note 22 *supra*.

success in the legislature.⁵⁹ Before inaugurating a campaign for more judges, careful studies should be made to document the need.

2. Provide Law Clerks to Judges at all Levels

The presence of a law clerk assisting with research ought to relieve the judge from some of his burden, and thus allow him to spend more time on tasks that will eliminate congestion and improve the quality of his judging. Research here might produce proposed legislation necessary to provide qualified clerks for judges at all levels.

3. Impose Time Limitations and Sanctions

It may be possible to promulgate statutes which limit the time within which judges can file decisions, hand down rulings on motions, and perform other judicial functions with suitable accommodations, of course, for unusual situations. The difficulty with such statutes is in their enforcement. It is unlikely that a litigant would care to prejudice his case by bringing an action, such as mandamus, against a judge to enforce them. But a powerful chief judge or a superior court with superintending control could be granted power to employ sanctions against judges to insure compliance with the statutes.

4. Readjustment of the Judicial Assignment System

Research into the method of assigning cases to judges might profitably be undertaken. The purpose of such research should be to achieve an accommodation among the various assignment methods which most efficiently utilizes judicial resources.⁶⁰ To this end it is suggested that the individual assignment system be given special attention. There, the assignment commissioner assigns each new case for all purposes to a single, named judge as soon as the petition is filed. If properly administered, this system will tend to avoid the darkened courtroom, to distribute cases requiring special expertise to the judges possessing special knowledge, to cut down delay caused when different judges have to familiarize themselves with a complex case for the purposes of handling different phases of the same case, to allow related litigation to be assigned to a single judge who will tend to develop a feel for the entire subject matter, to prevent lawyers from picking and choosing favorite judges, and to focus light, where

⁵⁹ Cf. Nims, "New York's 100 Years Struggle for Better Civil Justice," 25 N.Y.S. B. Bull. 83 (1953).

⁶⁰ See 1964 Common Pleas Judges' Meeting 9.

warranted, upon judges who are not carrying their fair share of the judicial workload.

There are, of course, some disadvantages of the individual assignment system which ought not to be overlooked. It may not be fair, for example, to measure the effectiveness of a judge in an elected system by his score of cases disposed of; through no fault of his own he may be assigned a long, complicated case. Furthermore, it would be doing a disservice to the law if fear of a bad score encouraged judges to give inadequate consideration to decisions, or to coerce settlement. The avoidance of such disadvantages, perhaps by modifying the individual assignment system by bringing in elements of the "master control" system, or by introducing entirely novel procedures, ought also to be a major aim of research in this area.

5. Special Education for Judges

Educational programs which deal with problems of judicial administration are now available.⁶¹ Perhaps the bar could sponsor travel by local judges to such meetings or, preferably, sponsor legislation which would provide state funds for that purpose. If most local trial judges are unable to attend existing programs, the bar might support classes, seminars and conferences manned by experts on the problems of judicial administration and conducted throughout the state. Such programs should be designed to supplement, but not to replace, judicial conferences conducted by the judges, themselves, through their own associations and judicial conferences. If, as is suspected, the judges now attending such conferences are those who are already interested and active in solving problems of judicial administration, methods should be devised to attract the others into the educational process.

D. *The Public*

Most of the problems of nonbeneficial delay could be solved if those in the legal profession who are concerned about them could draw upon support for needed reforms from the general public. It has even been suggested that improvement can only come when non-lawyers organize themselves to take up the cudgel of reform.⁶² In any event, legislative and, where necessary, constitutional reform can only be accomplished with public support. Such support, in turn, cannot be expected in the absence of effective public education. The

⁶¹ Institute of Judicial Administration, *Judicial Education in the United States*, A Survey 78 (1965).

⁶² See Nims, note 59 *supra*.

public is not likely to put its weight behind legislation calling for additional judgeships unless it understands that a pressing need exists.

Unfortunately, the legal profession has not had the best public relations in the past. Coming but once a year, Law Day cannot be expected to educate the people to the operation of the judiciary or create understanding for the problems of the legal profession. What is recommended, therefore, is the adoption of a program to inform the public of the role, functions and operations of the legal process. Such a program should not be directed specifically to the problem of delay, nor should it be conducted at the level of propaganda. Respect for the legal profession cannot be created by slogans, shibboleths, or breezy generalizations. The program should not conceal the problems that exist in judicial administration. Instead, it should attempt to *educate* the public, using that term in its most salutary sense. Every available means of public communication should be used: the press, radio, television, seminars, public lectures. Particularly, the bar should attempt to reach the youth of the community through the public schools.

The ultimate purpose of such a program, it is suggested, would be to revitalize the democratic process. If members of the public are knowledgeable about an institution of vital importance to society they will develop a critical ability—a sense of taste—which will enable them to decide intelligently for themselves which facets of the institution should be praised and venerated, and which should arouse their opprobrium and reforming zeal.

More specifically, the kind of program envisioned might include:

(1) Realistic dramatizations, in the public media, of the operations of the judicial process.

(2) Accurate, well-written newspaper accounts of trials.

(3) Explications, in the various media, of important appellate decisions in interesting, narrative form.

(4) Introduction of study of the judicial process into the curricula of elementary and secondary schools.

(5) Lectures by lawyers, judges and law professors, *carefully selected* for the depth of their perception, to public and private groups, and particularly to youth groups. The availability of such lectures could be publicized through state and local speakers' bureaus.

(6) Public debates about the effectiveness and efficiency of legal institutions.

(7) Pressure by the organized bar on public media to report fully, fairly and accurately and, if possible, nonsensationally, on vital matters relating to legal institutions. This would include bar-supported condemnation of false and misleading reporting.

CONCLUSION

The list of recommendations advanced here is not intended to be exhaustive. There are other programs which might prove equally as fruitful as those which have been included. Examples include studies of the Ohio lawyer, litigant and judge, which might yield illuminating data on how or why these persons create or tolerate delay; or research into the use of electronic devices which might result in recommendations to enhance the efficiency of courts. Examination of the causes of delay, as set forth in part II of this paper, will also suggest other fruitful inquiries. It is only to keep within manageable proportions that the programs set forth here have been rather arbitrarily limited to inquiries which can lead to effective reform within a reasonable time and to problems which cry for immediate attention.